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YouTube, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT TUR d/b/a LOS ANGELES NEWS SERVICE,

Plaintiff,

v.

YOUTUBE, INC.,

Defendant.

CASE NO.: CV 06-4436 FMC (AJWx)

DECLARATION OF ZAHAVAH LEVINE IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION OF DEFENDANT'S FIRST AFFIRMATIVE DEFENSE OF DMCA SAFE HARBOR

Date of Hearing: Jan. 29, 2007
Time: 10:00 a.m.
Court: The Honorable Florence-Marie Cooper

DOCKETED ON CM
JAN 18 2007
BY mb 009

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EXHIBIT 29
Levine
KR 4-2-09

I, Zahavah Levine, declare as follows:

1. I am currently Associate General Counsel of Google, Inc. ("Google"). Prior to Google's acquisition of YouTube, Inc. ("YouTube"), I was General Counsel of YouTube. I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify competently to them.

2. A principal part of my job responsibilities since I arrived at YouTube in March 2006 has been to assist the company and copyright holders in combating the unauthorized uploading of video clips to our service. YouTube has always made this issue a high priority within the company, and I have the support of ten other full time employees focused on copyright issues as well as senior management in this effort.

YouTube's User Education

3. YouTube's approach to protecting copyright holders starts with the education of its users. Through multiple means, YouTube warns users that they are prohibited from uploading to our service any copyrighted content that they do not have the rights to share.

4. To upload any clip, an individual must register for our service. As part of the registration process, users must affirmatively accept the service's terms of use. A copy of our terms of use agreement is located at http://www.youtube.com/t/terms and attached to this declaration as Exhibit A. In bolded text, our terms of use agreement explicitly prohibit users from uploading copyrighted material that they do not have the right or authorization to share:

> **In connection with User Submissions, you further agree that you will not: (i) submit material that is copyrighted, protected by trade secret or otherwise subject to third party proprietary rights, including privacy and publicity rights, unless you are the owner of such rights or have permission from their rightful owner to post**

the material and to grant YouTube all of the license rights granted herein . . . .

YouTube's terms of use also make clear that:

> YouTube does not permit copyright infringing activities and infringement of intellectual property rights on its Website, and YouTube will remove all Content and User Submissions if properly notified that such Content or User Submission infringes on another's intellectual property rights. YouTube reserves the right to remove Content and User Submissions without prior notice. YouTube will also terminate a User's access to its Website, if they are determined to be a repeat infringer. A repeat infringer is a User who has been notified of infringing activity more than twice and/or has had a User Submission removed from the Website more than twice.

5. In addition, to further deter infringing activity, YouTube requires that a user submit a valid and working email address to the company before the user may upload any clip. YouTube verifies the accuracy of the email address provided by sending an email to the email address provided by the user and requiring the user to respond to it. Only after the accuracy is verified may the user upload a video to the service.

6. Beyond the express agreement YouTube obtains from users and the warnings contained in that agreement, each time a user seeks to upload a video, YouTube explicitly reminds them, via four messages prominently displayed in the upload process, that they are prohibited from uploading copyrighted content unless they have the right or authorization to do so. The first of the messages, displayed on the first of two "Video Upload" screens a user encounters in order to upload a video reads, in large bold font:

> **Do not upload copyrighted material for which you don't own the rights or have permission from the owner.**

A copy of the first page a user encounters to upload a video clip is attached as Exhibit B. The other anti-copyright infringement messages, which are displayed on the second of two "Video Upload" screens a user encounters in order to upload a video, reads as follows (including the bold font):

> **Do not upload copyrighted, obscene or any other material which violates YouTube's Terms of Use.**
>
> ***
>
> **Do not upload any TV shows, music videos, music concerts, or commercials without permission unless they consist entirely of content you created yourself.**
>
> By clicking "Upload Video" you are representing that this video does not violate YouTube's Term of Use and that you own all copyrights in this video or have express permission from the copyright owner(s) to upload it.
>
> Read Copyright Tips for more information about copyright and YouTube's policy.

A copy of the second "Video Upload" page a user encounters to upload a clip is attached as Exhibit C.

7. Displayed at the bottom of *every* page on YouTube's site are links to YouTube's "Copyright FAQ", "Code of Conduct," and "Terms of Use" pages, all of which clearly warn users of their duty not to commit copyright infringement, and the consequences of unauthorized posting of copyrighted material. The Code of Conduct, for example, provides:

> Respect **copyright**. Only upload videos that you made or that you have obtained the rights to use. This means don't upload videos you didn't make, or use content in your videos that someone else owns the copyright to, such as music tracks, snippets of copyrighted programs, or videos made by other users, without their permission. Read our Copyright Tips for more information.

A copy of the Code of Conduct page is attached to this declaration as Exhibit D.

8. On our "Copyright Tips" page, located at http://youtube.com/t/howto_copyright, we give users considerable practical guidance on: "How To Make Sure Your Video Does Not Infringe Someone Else's Copyrights," and again describe the consequences to users of copyright infringement. A copy of this page is attached to this Declaration as Exhibit E.

YouTube's DMCA Compliance

9. In addition to educating users about avoiding copyright infringement, YouTube has sought to assist copyright owners in preventing infringement by electing to comply with the requirements and procedures of Section 512 of the Digital Millennium Copyright Act ("DMCA").

Registering a DMCA Agent

10. YouTube has designated an agent pursuant to the requirements of the DMCA, and has provided that agent's contact information to the Copyright Office. YouTube's agent is available to receive notifications of claimed infringement, and can be contacted at: DMCA Complaints, YouTube, Inc., 1000 Cherry Ave., Second Floor, San Bruno, CA 94066, Fax Number (650) 872-8513, copyright@youtube.com.

11. Our DMCA agent's contact information is prominently displayed on YouTube's "Copyright Infringement Notification" page, located at http://www.youtube.com/t/dmca_policy. Rights holders can access this information via numerous links located on various YouTube.com pages, including: (1) each page that displays an individual video clip, below which is located a link that allows users to "Flag as Inappropriate" the content of the clip; (2) the "Contact Us" page; and (3) the "Copyright Tips" page. Additionally, included at the bottom

of *every* page displayed on YouTube.com is a "Copyright FAQ" link that transfers visitors directly to the "Copyright Infringement Notification" page on our site.

Notice and Takedown Procedure

12. When YouTube's DMCA agent receives a notice of an alleged infringement that substantially complies with the notification requirements of the DMCA, we act expeditiously to remove or disable access to the identified content. We have listed on the "Copyright FAQ" on our site under the title "Copyright Infringement Notification" the information that we request copyright holders provide to YouTube to enable us to locate and remove allegedly infringing content from our service:

> To file a copyright infringement notification with us, you will need to send a written communication that includes substantially the following (please consult your legal counsel or see Section 512(c)(3) of the Copyright Act to confirm these requirements):
>
> A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
>
> Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
>
> Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material. **Providing URLs in the body of an email is the best way to help us locate content quickly.**

Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

A true and correct copy of this page, http://www.youtube.com/t/dmca_policy is attached hereto as Exhibit F.

13. Given that our service hosts millions of clips, it is especially important that a party sending in a notification of alleged infringement provide us with information sufficiently specific for us to identify the video in question. As highlighted in the language quoted above, this often requires the unique Internet address, called a "URL" (for Uniform Resource Locator), at which the party claims the allegedly infringing clip may be found on the service (e.g. http://www.youtube.com/watch?v=rsUtF8XPtVE). Absent a URL, it is often difficult, if not impossible for YouTube to determine which clip is addressed by the notification. Without this degree of specificity, YouTube may end up removing content that users have every right to share. It is for this reason that when YouTube receives a notification that lacks a specific URL, if the notice does not otherwise contain information sufficiently specific to determine the video in

question, YouTube promptly requests such information from the party supplying the notification.

14. Once YouTube receives a notification of alleged infringement that substantially complies with the DMCA's requirements, we act expeditiously to remove the allegedly infringing material from our service or restrict access to the material. We act upon proper notifications within 24 hours seven days a week, and in most cases within 50 minutes. Our goal is to make it easy for copyright owners to inform us of alleged copyright infringement on our site. We have even created a content verification program which employs a software tool that enables content owners to search for their content on the site. The tool allows content owners to easily notify us that they wish specific content to be removed simply by checking a box. Our provision of this tool has been received quite favorably and the tool has been used by dozens of copyright owners.

15. Over its existence, YouTube has received and complied with thousands of these takedown requests, but in total, the requests have been directed to only a tiny fraction of the millions of clips that have been uploaded to YouTube.

Termination of Accounts of Repeat Infringers

16. YouTube also terminates the accounts of repeat, alleged infringers. If YouTube receives more than two takedown notices for content uploaded by a particular user, or the user has her content removed from the service more than two times, then YouTube will terminate the user's account. YouTube then prevents the user from subsequently creating another account by recording and blocking her specific email address. Users are warned of this repeat infringer policy in YouTube's terms of use, on its "Copyright Tips" and "Copyright Notices" pages, and via email when notified that a video has been removed due to alleged copyright infringement.

17. YouTube routinely enforces its repeat infringer policy, and has terminated the accounts of approximately fifteen thousand users who have been accused of repeat infringement. Those users, however, represent only a very small fraction of YouTube's user base. Since its inception, over fifty million users have registered for accounts on the YouTube website.

Accommodation of Standard Technologies

18. YouTube's service does not interfere with standard technical measures for preventing digital copyright infringement. In fact, the proactive steps that YouTube has taken to protect copyright holders' rights go well beyond anything that could be considered standard. YouTube has, for example, implemented automated filtering mechanisms, and will soon launch improved filtering mechanisms at the urging of large copyright holders. These mechanisms, specifically our "MD-5 Hash" technology and audio fingerprint technology (which Mr. Chen discusses in his declaration), are state of the art for protecting digital content. YouTube has deployed and will deploy them as part of its commitment to helping copyright owners protect their content. Moreover, YouTube is a streaming-only service, and prohibits users from downloading or copying videos. YouTube has also voluntarily imposed a ten-minute limit on the length of videos permitted to be uploaded to the site by users with standard accounts in order to prevent the upload of full-length commercial TV programming and movies. These and other measures described by Mr. Chen, have all been taken with the interests of copyright holders in mind.

Mr. Tur's Allegations of Copyright Infringement

19. Prior to the filing of this lawsuit, YouTube did not know that any clips using the content which Mr. Tur claims to own had been uploaded to our service, let alone that Mr. Tur believed that such clips had been uploaded without the

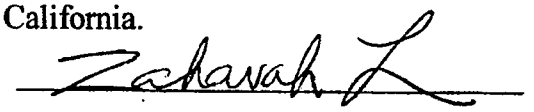
requisite authorization. Mr. Tur did not, prior to filing this lawsuit, provide YouTube with any notice pursuant to the DMCA or otherwise, of these contentions.

20. Based solely on the non-specific descriptions in his Complaint of the videos containing Mr. Tur's copyrighted works, we removed all the clips on our service that we were able to locate which we believed may have been those he contends infringe his copyrights. Specifically, we removed ten clips between July 17, 2006 (the day we received Mr. Tur's complaint) and July 19, 2006 that we believe may have contained at least some content from the identified copyrighted works that Mr. Tur claims to own. However, we were not able to locate clips for each of the copyrighted works to which Mr. Tur referred in his Complaint because he provided very little information about the videos containing each work. For example, Mr. Tur described one of his allegedly infringed copyrighted works only as "PA-839-603: 'Earthquake.'" However, a search for the numerical sequence "PA-839-603" yielded no results on the YouTube service. And a search for the term "Earthquake" yielded over six hundred results, of which we had no basis to determine which, if any of them, contained the content to which Mr. Tur alluded in his Complaint. To this day, Mr. Tur has failed to identify the URLs or specific locations of the clips that he contends are infringing.

21. In July 2006, YouTube sent a letter to Mr. Tur requesting that he sufficiently identify the allegedly infringing content, so that YouTube could remove it from its service. Exhibit G, attached hereto, is a true and correct copy of that letter. We specifically requested that Mr. Tur provide us with the URLs of the clips in question. In Mr. Tur's reply, he failed to identify specifically any allegedly infringing video clip, much less provide the location (i.e. a URL) of that clip on our service. Exhibit H, attached hereto, is a true and correct copy of Mr. Tur's response.

22. If Mr. Tur were to notify us of the locations of the allegedly infringing clips, specifically the unique URLs at which the content can be found, then YouTube would immediately remove them from its service. Absent such notice, YouTube is unable to remove the allegedly infringing material because we do not know what clips, among the millions on our site, Mr. Tur claims to have the rights to, and what clips Mr. Tur believes were uploaded to our service without the appropriate authorization.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed the 5th day of January, 2007, at San Bruno, California.



Zahavah Levine

Levine Exhibit A

EX. A

Terms of Use

1. Your Acceptance

BY USING AND/OR VISITING THIS WEBSITE (collectively, including all Content available through the YouTube.com domain name, the "YouTube Website", or "Website"), YOU SIGNIFY YOUR ASSENT TO BOTH THESE TERMS AND CONDITIONS (the "Terms of Service") AND THE TERMS AND CONDITIONS OF YOUTUBE'S PRIVACY NOTICE, WHICH ARE PUBLISHED AT http://www.youtube.com/t/privacy, AND WHICH ARE INCORPORATED HEREIN BY REFERENCE. If you do not agree to any of these terms, then please do not use the YouTube Website.

2. YouTube Website

These Terms of Service apply to all users of the YouTube Website, including users who are also contributors of video content, information, and other materials or services on the Website. The YouTube Website may contain links to third party websites that are not owned or controlled by YouTube. YouTube has no control over, and assumes no responsibility for, the content, privacy policies, or practices of any third party websites. In addition, YouTube will not and cannot censor or edit the content of any third-party site. By using the Website, you expressly relieve YouTube from any and all liability arising from your use of any third-party website. Accordingly, we encourage you to be aware when you leave the YouTube Website and to read the terms and conditions and privacy policy of each other website that you visit.

3. Website Access

A. YouTube hereby grants you permission to use the Website as set forth in this Terms of Service, provided that: (i) your use of the Website as permitted is solely for your personal, noncommercial use; (ii) you will not copy or distribute any part of the Website in any medium without YouTube's prior written authorization; (iii) you will not alter or modify any part of the Website other than as may be reasonably necessary to use the Website for its intended purpose; and (iv) you will otherwise comply with the terms and conditions of these Terms of Service.

B. In order to access some features of the Website, you will have to create an account. You may never use another's account without permission. When creating your account, you must provide accurate and complete information. You are solely responsible for the activity that occurs on your account, and you must keep your account password secure. You must notify YouTube immediately of any breach of security or unauthorized use of your account. Although YouTube will not be liable for your losses caused by any unauthorized use of your account, you may be liable for the losses of YouTube or others due to such unauthorized use.

C. You agree not to use or launch any automated system, including without limitation, "robots," "spiders," "offline readers," etc., that accesses the Website in a manner that sends more request messages to the YouTube servers in a given period of time than a human can reasonably produce in the same period by using a convention on-line web browser. Notwithstanding the foregoing, YouTube grants the operators of public search engines permission to use spiders to copy materials from the site for the sole purpose of creating publicly available searchable indices of the materials, but not caches or archives of such materials. YouTube reserves the right to revoke these exceptions either generally or in specific cases. You agree not to collect or harvest any personally identifiable information, including account names, from the Website, nor to use the communication systems provided by the Website for any commercial solicitation purposes. You agree not to solicit, for commercial purposes, any users of the Website with respect to their User Submissions.

4. Intellectual Property Rights

The content on the YouTube Website, except all User Submissions (as defined below), including without limitation, the text, software, scripts, graphics, photos, sounds, music, videos, interactive features and the like ("Content") and the trademarks, service marks and logos contained therein ("Marks"), are owned by or licensed to YouTube, subject to copyright and other intellectual property rights under United States and foreign laws and international conventions. Content on the Website is provided to you AS IS for your information and personal use only and may not be used, copied, reproduced, distributed, transmitted, broadcast, displayed, sold, licensed, or otherwise exploited for any other purposes whatsoever without the prior written consent of the respective owners. YouTube reserves all rights not expressly granted in and to the Website and the Content. You agree to not engage in the use, copying, or distribution of any of the Content other than expressly permitted herein, including any use, copying, ordistribution of User Submissions of third parties obtained through the Website for any commercial purposes. If you download or print a copy of the Content for personal use, you must retain all copyright and other proprietary notices contained therein. You agree not to circumvent, disable or otherwise interfere with security related features of the YouTube Website or features that prevent or restrict use or copying of any Content or enforce limitations on use of the

YouTube Website or the Content therein.

5. User Submissions

A. The YouTube Website may now or in the future permit the submission of videos or other communications submitted by you and other users ("User Submissions") and the hosting, sharing, and/or publishing of such User Submissions. You understand that whether or not such User Submissions are published, YouTube does not guarantee any confidentiality with respect to any submissions.

B. You shall be solely responsible for your own User Submissions and the consequences of posting or publishing them. In connection with User Submissions, you affirm, represent, and/or warrant that: (i) you own or have the necessary licenses, rights, consents, and permissions to use and authorize YouTube to use all patent, trademark, trade secret, copyright or other proprietary rights in and to any and all User Submissions to enable inclusion and use of the User Submissions in the manner contemplated by the Website and these Terms of Service; and (ii) you have the written consent, release, and/or permission of each and every identifiable individual person in the User Submission to use the name or likeness of each and every such identifiable individual person to enable inclusion and use of the User Submissions in the manner contemplated by the Website and these Terms of Service. **For clarity, you retain all of your ownership rights in your User Submissions.** However, by submitting the User Submissions to YouTube, you hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the User Submissions in connection with the YouTube Website and YouTube's (and its successor's) business, including without limitation for promoting and redistributing part or all of the YouTube Website (and derivative works thereof) in any media formats and through any media channels. You also hereby grant each user of the YouTube Website a non-exclusive license to access your User Submissions through the Website, and to use, reproduce, distribute, prepare derivative works of, display and perform such User Submissions as permitted through the functionality of the Website and under these Terms of Service. The foregoing license granted by you terminates once you remove or delete a User Submission from the YouTube Website.

C. **In connection with User Submissions, you further agree that you will not: (i) submit material that is copyrighted, protected by trade secret or otherwise subject to third party proprietary rights, including privacy and publicity rights, unless you are the owner of such rights or have permission from their rightful owner to post the material and to grant YouTube all of the license rights granted herein; (ii) publish falsehoods or misrepresentations that could damage YouTube or any third party; (iii) submit material that is unlawful, obscene, defamatory, libelous, threatening, pornographic, harassing, hateful, racially or ethnically offensive, or encourages conduct that would be considered a criminal offense, give rise to civil liability, violate any law, or is otherwise inappropriate; (iv) post advertisements or solicitations of business; (v) impersonate another person.** YouTube does not endorse any User Submission or any opinion, recommendation, or advice expressed therein, and YouTube expressly disclaims any and all liability in connection with User Submissions. YouTube does not permit copyright infringing activities and infringement of intellectual property rights on its Website, and YouTube will remove all Content and User Submissions if properly notified that such Content or User Submission infringes on another's intellectual property rights. YouTube reserves the right to remove Content and User Submissions without prior notice. YouTube will also terminate a User's access to its Website, if they are determined to be a repeat infringer. A repeat infringer is a User who has been notified of infringing activity more than twice and/or has had a User Submission removed from the Website more than twice. YouTube also reserves the right to decide whether Content or a User Submission is appropriate and complies with these Terms of Service for violations other than copyright infringement and violations of intellectual property law, such as, but not limited to, pornography, obscene or defamatory material, or excessive length. YouTube may remove such User Submissions and/or terminate a User's access for uploading such material in violation of these Terms of Service at any time, without prior notice and at its sole discretion.

D. In particular, if you are a copyright owner or an agent thereof and believe that any User Submission or other content infringes upon your copyrights, you may submit a notification pursuant to the Digital Millennium Copyright Act ("DMCA") by providing our Copyright Agent with the following information in writing (see 17 U.S.C 512(c)(3) for further detail):

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site;

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled and information reasonably sufficient to permit the service provider to locate the material;

(iv) Information reasonably sufficient to permit the service provider to contact you, such as an address, telephone number, and, if available, an electronic mail;

(v) A statement that you have a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that you are authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

YouTube's designated Copyright Agent to receive notifications of claimed infringement is: Heather Gillette, 1000 Cherry Ave., Second Floor, San Bruno, CA 94066, email: copyright@youtube.com, telephone: 650-827-6064, fax: 650-872-8513. For clarity, only DMCA notices should go to the Copyright Agent; any other feedback, comments, requests for technical support, and other communications should be directed to YouTube customer service through http://www.youtube.com/contact. You acknowledge that if you fail to comply with all of the requirements of this Section 5(D), your DMCA notice may not be valid.

E. You understand that when using the YouTube Website, you will be exposed to User Submissions from a variety of sources, and that YouTube is not responsible for the accuracy, usefulness, safety, or intellectual property rights of or relating to such User Submissions. You further understand and acknowledge that you may be exposed to User Submissions that are inaccurate, offensive, indecent, or objectionable, and you agree to waive, and hereby do waive, any legal or equitable rights or remedies you have or may have against YouTube with respect thereto, and agree to indemnify and hold YouTube, its Owners/Operators, affiliates, and/or licensors, harmless to the fullest extent allowed by law regarding all matters related to your use of the site.

F. YouTube permits you to link to materials on the Website for personal, non-commercial purposes only. In addition, YouTube provides an "Embeddable Player" feature, which you may incorporate into your own personal, non-commercial websites for use in accessing the materials on the Website, provided that you include a prominent link back to the YouTube website on the pages containing the Embeddable Player. YouTube reserves the right to discontinue any aspect of the YouTube Website at any time.

6. Warranty Disclaimer

YOU AGREE THAT YOUR USE OF THE YOUTUBE WEBSITE SHALL BE AT YOUR SOLE RISK. TO THE FULLEST EXTENT PERMITTED BY LAW, YOUTUBE, ITS OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, IN CONNECTION WITH THE WEBSITE AND YOUR USE THEREOF. YOUTUBE MAKES NO WARRANTIES OR REPRESENTATIONS ABOUT THE ACCURACY OR COMPLETENESS OF THIS SITE'S CONTENT OR THE CONTENT OF ANY SITES LINKED TO THIS SITE AND ASSUMES NO LIABILITY OR RESPONSIBILITY FOR ANY (I) ERRORS, MISTAKES, OR INACCURACIES OF CONTENT, (II) PERSONAL INJURY OR PROPERTY DAMAGE, OF ANY NATURE WHATSOEVER, RESULTING FROM YOUR ACCESS TO AND USE OF OUR WEBSITE, (III) ANY UNAUTHORIZED ACCESS TO OR USE OF OUR SECURE SERVERS AND/OR ANY AND ALL PERSONAL INFORMATION AND/OR FINANCIAL INFORMATION STORED THEREIN, (IV) ANY INTERRUPTION OR CESSATION OF TRANSMISSION TO OR FROM OUR WEBSITE, (IV) ANY BUGS, VIRUSES, TROJAN HORSES, OR THE LIKE WHICH MAY BE TRANSMITTED TO OR THROUGH OUR WEBSITE BY ANY THIRD PARTY, AND/OR (V) ANY ERRORS OR OMISSIONSIN ANY CONTENT OR FOR ANY LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF THE USE OF ANY CONTENT POSTED, EMAILED, TRANSMITTED, OR OTHERWISE MADE AVAILABLE VIA THE YOUTUBE WEBSITE. YOUTUBE DOES NOT WARRANT, ENDORSE, GUARANTEE, OR ASSUME RESPONSIBILITY FOR ANY PRODUCT OR SERVICE ADVERTISED OR OFFERED BY A THIRD PARTY THROUGH THE YOUTUBE WEBSITE OR ANY HYPERLINKED WEBSITE OR FEATURED IN ANY BANNER OR OTHER ADVERTISING, AND YOUTUBE WILL NOT BE A PARTY TO OR IN ANY WAY BE RESPONSIBLE FOR MONITORING ANY TRANSACTION BETWEEN YOU AND THIRD-PARTY PROVIDERS OF PRODUCTS OR SERVICES. AS WITH THE PURCHASE OF A PRODUCT OR SERVICE THROUGH ANY MEDIUM OR IN ANY ENVIRONMENT, YOU SHOULD USE YOUR BEST JUDGMENT AND EXERCISE CAUTION WHERE APPROPRIATE.

7. Limitation of Liability

IN NO EVENT SHALL YOUTUBE, ITS OFFICERS, DIRECTORS, EMPLOYEES, OR AGENTS, BE LIABLE TO YOU FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES WHATSOEVER RESULTING FROM ANY (I) ERRORS, MISTAKES, OR INACCURACIES OF CONTENT, (II) PERSONAL INJURY OR PROPERTY DAMAGE, OF ANY NATURE WHATSOEVER, RESULTING FROM YOUR ACCESS TO AND USE OF OUR WEBSITE, (III) ANY UNAUTHORIZED ACCESS TO OR USE OF OUR SECURE SERVERS AND/OR ANY AND ALL PERSONAL INFORMATION AND/OR FINANCIAL INFORMATION STORED THEREIN, (IV) ANY INTERRUPTION OR CESSATION OF TRANSMISSION TO OR FROM OUR WEBSITE, (IV) ANY BUGS, VIRUSES, TROJAN HORSES, OR THE LIKE, WHICH MAY BE TRANSMITTED TO OR THROUGH OUR WEBSITE BY ANY THIRD PARTY, AND/OR (V) ANY ERRORS OR OMISSIONS IN ANY CONTENT OR FOR ANY LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF YOUR USE OF ANY CONTENT POSTED, EMAILED, TRANSMITTED, OR OTHERWISE MADE AVAILABLE VIA THE YOUTUBE WEBSITE, WHETHER BASED ON WARRANTY, CONTRACT, TORT, OR ANY OTHER LEGAL THEORY, AND WHETHER ORNOT THE COMPANY IS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING LIMITATION OF LIABILITY SHALL APPLY TO THE FULLEST EXTENT PERMITTED BY LAW IN THE APPLICABLE JURISDICTION.

YOU SPECIFICALLY ACKNOWLEDGE THAT YOUTUBE SHALL NOT BE LIABLE FOR USER SUBMISSIONS OR THE DEFAMATORY, OFFENSIVE, OR ILLEGAL CONDUCT OF ANY THIRD PARTY AND THAT THE RISK OF HARM OR DAMAGE FROM THE FOREGOING RESTS ENTIRELY WITH YOU.

The Website is controlled and offered by YouTube from its facilities in the United States of America. YouTube makes no representations that the YouTube Website is appropriate or available for use in other locations. Those who access or use the YouTube Website from other jurisdictions do so at their own volition and are responsible for compliance with local law.

8. Indemnity

You agree to defend, indemnify and hold harmless YouTube, its parent corporation, officers, directors, employees and agents, from and against any and all claims, damages, obligations, losses, liabilities, costs or debt, and expenses (including but not limited to attorney's fees) arising from: (i) your use of and access to the YouTube Website; (ii) your violation of any term of these Terms of Service; (iii) your violation of any third party right, including without limitation any copyright, property, or privacy right; or (iv) any claim that one of your User Submissions caused damage to a third party. This defense and indemnification obligation will survive these Terms of Service and your use of the YouTube Website.

9. Ability to Accept Terms of Service

You affirm that you are either more than 18 years of age, or an emancipated minor, or possess legal parental or guardian consent, and are fully able and competent to enter into the terms, conditions, obligations, affirmations, representations, and warranties set forth in these Terms of Service, and to abide by and comply with these Terms of Service. In any case, you affirm that you are over the age of 13, as the YouTube Website is not intended for children under 13. **If you are under 13 years of age, then please do not use the YouTube Website—there are lots of other great web sites for you. Talk to your parents about what sites are appropriate for you.**

10. Assignment

These Terms of Service, and any rights and licenses granted hereunder, may not be transferred or assigned by you, but may be assigned by YouTube without restriction.

11. General

You agree that: (i) the YouTube Website shall be deemed solely based in California; and (ii) the YouTube Website shall be deemed a passive website that does not give rise to personal jurisdiction over YouTube, either specific or general, in jurisdictions other than California. These Terms of Service shall be governed by the internal substantive laws of the State of California, without respect to its conflict of laws principles. Any claim or dispute between you and YouTube that arises in whole or in part from the YouTube Website shall be decided exclusively by a court of competent jurisdiction located in San Mateo County, California. These Terms of Service, together with the Privacy Notice at http://www.youtube.com/t/privacy and any other legal notices published by YouTube on the Website, shall constitute the entire agreement between you and YouTube concerning the YouTube Website. If any provision of these Terms of Service is deemed invalid by a court of competent jurisdiction, the invalidity of such provision shall not affect the validity of the remaining provisions of these Terms of Service, which shall remain in full force and effect. No waiver of any term of this these Terms of Service shall be deemed a further or continuing waiver of such term or any other term, and YouTube's failure to assert any right or provision under these Terms of Service shall not constitute a waiver of such right or provision. YouTube reserves the right to amend these Terms of Service at any time and without notice, and it is your responsibility to review these Terms of Service for any changes. Your use of the YouTube Website following any amendment of these Terms of Service will signify your assent to and acceptance of its revised terms. YOU AND YOUTUBE AGREE THAT ANY CAUSE OF ACTION ARISING OUT OF OR RELATED TO THE YOUTUBE WEBSITE MUST COMMENCE WITHIN ONE (1) YEAR AFTER THE CAUSE OF ACTION ACCRUES. OTHERWISE, SUCH CAUSE OF ACTION IS PERMANENTLY BARRED.

Search

Your Account			Help & Info			YouTube		
Videos	Playlists	Subscriptions	Help Center	Developer APIs	Copyright FAQ	Company Info	Terms of Use	Bl
Favorites	Inbox	more...	Video Toolbox	Safety Tips	Code of Conduct	Test Tube	Privacy Policy	C

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Levine Exhibit B

EX.R

Video Upload (Step 1 of 2) (All fields required)

Uploading a video is a two-step process—on the next page, you'll be able to choose your video file and set the privacy settings.

Record videos directly from your desktop camera!
Try it now

Upload videos directly from your mobile phone!
Set up your preferences

Upload Tips

- Uploads will usually take 1-5 minutes per MB on a high-speed connection.
- Converting your video takes a few minutes; you can add more info or upload more videos while it's processing.
- Videos are limited to 10 minutes (unless you're a Director) and 100 MB.
- Videos saved with the following settings convert the best:
  - MPEG4 (Divx, Xvid) format
  - 320x240 resolution
  - MP3 audio
  - 30 frames per second framerate

Title:

Description:

Tags:

Enter one or more tags, separated by spaces.
Tags are keywords used to describe your video so it can be easily found by other users. For example, if you have a surfing video, you might tag it: `surfing beach waves`.

Exhibit B
15

Video Category:

- O Arts & Animation
- O Autos & Vehicles
- O Comedy
- O Entertainment
- O Music
- O News & Blogs
- O People
- O Pets & Animals
- O Science & Technology
- O Sports
- O Travel & Places
- O Video Games

Language: English

Do not upload copyrighted material for which you don't own the rights or have permission from the owner.

[redacted] **Or** [redacted]

[redacted]

Exhibit B
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Levine Exhibit C

EX.C

Video Upload (Step 2 of 2)

File:

Exhibit C
17

Broadcast:

- ◉ **Public:** Share your video with the world! (Recommended)
- ○ **Private:** Only viewable by you and those you choose.

To email this video and enable access now, choose a contact list.

- ☐ Family
- ☐ Friends

Do not upload any TV shows, music videos, music concerts, or commercials without permission unless they consist entirely of content you created yourself.

By clicking "Upload Video," you are representing that this video does not violate YouTube's Terms of Use and that you own all copyrights in this video or have express permission from the copyright owner(s) to upload it.

Read Copyright Tips for more information about copyright and YouTube's policy.

Upload Video

Uploading..

PLEASE BE PATIENT—THIS MAY TAKE SEVERAL MINUTES.
ONCE COMPLETED, YOU WILL SEE A CONFIRMATION MESSAGE.

Search

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Exhibit C
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Levine Exhibit D

EX.D

Help Center

YouTube Community Guidelines

Respect the YouTube Community

We're not asking for the kind of respect reserved for nuns, the elderly, and brain surgeons. We mean don't abuse the site. Every cool new community feature on YouTube involves a certain level of trust. We trust you to be responsible, and millions of users respect that trust, so please be one of them.

We Review Videos Flagged As Inappropriate

Okay, this one is more about us than you. When a video gets flagged as inappropriate, we review the video to determine whether it violates our Terms of Use—flagged videos are not automatically taken down by the system. If we remove your video after reviewing it, you can assume that we removed it purposefully, and you should take our warning notification seriously. Take a deep breath, read our Terms of Use and try to see it from our perspective. If you find other videos on YouTube with the same violations, please flag them so we can review them as well!

Don't Cross the Line

Here are some common-sense rules that will help you steer clear of trouble:

- YouTube is not for **pornography** or **sexually explicit content**. If this describes your video, even if it's a video of yourself, don't post it on YouTube. Also, be advised that we work closely with law enforcement and we report child exploitation. Please read our Safety Tips and stay safe on YouTube.
- Don't post videos showing **dangerous or illegal acts**, like animal abuse or bomb making.
- Real **violence** is not allowed. If your video shows someone getting hurt, attacked, or humiliated, don't post it.
- YouTube is **not a shock site**. Don't post gross-out videos of accidents, dead bodies and stuff like that. This includes war footage if it's intended to shock or disgust.
- Respect **copyright**. Only upload videos that you made or that you have obtained the rights to use. This means don't upload videos you didn't make, or use content in your videos that someone else owns the copyright to, such as music tracks, snippets of copyrighted programs, or videos made by other users, without their permission. Read our Copyright Tips for more information.
- We encourage free speech and defend everyone's right to express unpopular points of view. But we don't permit **hate speech** which contains **slurs** or the **malicious use of stereotypes** intended to attack or demean a particular gender, sexual orientation, race, religion, or nationality.

- There is zero tolerance for **predatory behavior, stalking, threats, harassment, invading privacy,** or the revealing of other members' **personal information**. Anyone caught doing these things may be permanently banned from YouTube.

Please take these rules seriously and take them to heart. Don't try to look for loopholes or try to lawyer your way around them--just understand them and try to respect the spirit in which they were created. Violations of the Terms of Use may result in a warning notification or may result in termination of your account and deletion of all your videos. We decide whether we believe your violation of our Terms of Use should result in termination of your account. **If you have an account terminated you are prohibited from ever signing up for another account!**

YouTube is for the Community

Remember that this is your community! Each and every user of YouTube makes the site what it is, so don't be afraid to dig in and get involved!

- **Have fun with the site.** There's a lot here to see, and lots of folks making amazing stuff—one of them might be you! Equipment's getting cheaper and easier to use all the time, so dive in and enjoy.
- **Let folks know what you think.** Feedback's part of the experience, and when done with respect, can be a great way to make friends, share stories, and make your time on YouTube richer. So leave comments, rate videos, make your own responses to videos that affect you, enter contests of interest—there's a lot going on and a lot of ways to participate here.
- **You may not like everything you see.** Some of the content here may offend you—if you find that it violates our Terms of Use, then click "Flag as Inappropriate" under the video you're watching to submit it for review by YouTube staff. If it doesn't, then consider just clicking on something else—why waste time watching videos you don't like?

That's it! Thanks for reading!

—The YouTube Team

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more...	Code of Conduct	Contact
		Press
		Jobs

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Levine Exhibit E

EV E

Help Center

Copyright Tips

We've been receiving a lot of questions from members about what makes a video copyright infringing and ineligible for upload on YouTube. Posting copyright-infringing content can lead to the termination of your account, and possibly monetary damages if a copyright owner takes you to court. Here are some guidelines to help you determine whether your video is eligible or whether it infringes someone else's copyright.

As a general matter, we at YouTube respect the rights of artists and creators, and hope you will work with us to keep our community a creative, legal and positive experience for everyone, including artists and creators.

How To Make Sure Your Video Does Not Infringe Someone Else's Copyrights

The way to ensure that your video doesn't infringe someone else's copyright is to use your skills and imagination to create something completely original. It could be as simple as taping some of your friends goofing around, and as complicated as filming your own short movie with a script, actors, and the whole works. If it's all yours, you never have to worry about the copyright—you own it! Make sure to follow the other guidelines in the terms of use, too.

Be sure that all components of your video are your original creation—even the audio portion. For example, if you use an audio track of a sound recording owned by a record label without that record label's permission, your video is infringing the copyrights of others, and we will take it down as soon as we become aware of it.

Commercial Content Is Copyrighted

The most common reason we take down videos for copyright infringement is that they are direct copies of copyrighted content and the owners of the copyrighted content have alerted us that their content is being used without their permission. Once we become aware of an unauthorized use, we will remove the video promptly. That is the law.

Some examples of copyrighted content (although not all) are:

- TV shows
  - Including sitcoms, sports broadcasts, news broadcasts, comedy shows, cartoons, dramas, etc.
  - Includes network and cable TV, pay-per-view and on-demand TV
- Music videos, such as the ones you might find on music video channels
- Videos of live concerts, even if you captured the video yourself

- Even if you took the video yourself, the performer controls the right to use his/her image in a video, the songwriter owns the rights to the song being performed, and sometimes the venue prohibits filming without permission, so this video is likely to infringe somebody else's rights.

- Movies and movie trailers
- Commercials
- Slide shows that include photos or images owned by somebody else

A Few Guiding Principles

- It doesn't matter how long or short the clip is, or exactly how it got to YouTube. If you taped it off cable, videotaped your TV screen, or downloaded it from some other website, it is still copyrighted, and requires the copyright owner's permission to distribute.
- It doesn't matter whether or not you give credit to the owner/author/songwriter—it is still copyrighted.
- It doesn't matter that you are not selling the video for money—it is still copyrighted.
- It doesn't matter whether or not the video contains a copyright notice—it is still copyrighted.
- It doesn't matter whether other similar videos appear on our site—it is still copyrighted.
- It doesn't matter if you created a video made of short clips of copyrighted content—even though you edited it together, the content is still copyrighted.

What Will Happen If You Upload Infringing Content

Anytime we become aware that a video or any part of a video on our site infringes the copyrights of a third party, we will take it down from the site. We are required to do so by law. If you believe that a video on the site infringes your copyright, send us a copyright notice and we will take it down. If you believe that we have removed a video that you uploaded in error and that you are the copyright owner or have permission, you can file a counter notice and let us know. If you repeatedly post infringing content, your account will be terminated. This is also a requirement of the law.

Using Some Copyrighted Content in Your Videos

While videos that are direct copies of someone else's content are clear copyright violations, there are certain very limited circumstances in which the use of very short clips of a copyrighted video or song may be legal even without permission. This is known as the "fair use" principle of copyright law.

To determine whether a particular use of a short clip of a copyrighted video or song qualifies as a "fair use," you need to analyze and weigh four factors that are outlined in the U.S. copyright statute. Unfortunately, the weighing of these four factors is often quite subjective and complex, and for this reason, it's often difficult to determine whether a particular use is a "fair use." If the copyright owner disagrees with your interpretation of fair use, the copyright owner may chose to resolve the dispute in court. If it turns out that your use is not a fair use, then you are infringing the copyrights of the owner and you may be liable for monetary damages.

If you would like to learn more about the principle of fair use, below are a few links to websites that discuss it. Please remember, however, that your decision about whether and how to exercise your fair use rights is solely yours, and we at YouTube bear no responsibility for your decision.

Fair Use Links on the Web

- http://www.copyright.gov/fls/fl102.html
- http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/
- http://www.copyrightwebsite.com/Info/Law/FairUse.aspx
- http://chillingeffects.org/fairuse/

DISCLAIMER: WE ARE NOT YOUR ATTORNEYS, AND THE INFORMATION WE PRESENT HERE IS NOT LEGAL ADVICE. WE PRESENT THIS INFORMATION FOR INFORMATIONAL PURPOSES ONLY.

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		Press
		Jobs

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Levine Exhibit F

EX.F

Copyright Infringement Notification

To file a copyright infringement notification with us, you will need to send a written communication that includes substantially the following (please consult your legal counsel or see Section 512(c)(3) of the Copyright Act to confirm these requirements):

i. A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
ii. Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
iii. Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material. **Providing URLs in the body of an email is the best way to help us locate content quickly.**
iv. Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
v. A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
vi. A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

Such written notice should be sent to our designated agent as follows:

DMCA Complaints
YouTube, Inc.
1000 Cherry Ave.
Second Floor
San Bruno, CA 94066
Fax: 650.872.8513
Email: copyright@youtube.com

Please also note that under Section 512(f) any person who knowingly materially misrepresents that material or activity is infringing may be subject to liability.

Counter-Notification

If you elect to send us a counter notice, to be effective it must be a written communication provided to our designated agent that includes substantially the following (please consult your legal counsel or see 17 U.S.C. Section 512(g)(3) to confirm these requirements):

A. A physical or electronic signature of the subscriber.
B. Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.
C. A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.
D. The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

Such written notice should be sent to our designated agent as follows:

DMCA Complaints
YouTube, Inc.
1000 Cherry Ave.
Second Floor
San Bruno, CA 94066
Fax: 650.872.8513
Email: copyright@youtube.com

Please note that under Section 512(f) of the Copyright Act, any person who knowingly materially misrepresents that material or activity was removed or disabled by mistake or misidentification may be subject to liability. Please also be advised that we enforce a policy that provides for the termination in appropriate circumstances of subscribers who are repeat infringers.

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Help & Info
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Video Toolbox Safety Tips Code of Conduct

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Test Tube Privacy Policy

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Levine Exhibit G

EX G

WSGR Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

701 Fifth Avenue, Suite 5100
Seattle, WA 98104-7036
PHONE 206.883.2500
FAX 206.883.2699
www.wsgr.com

KARIN B. SWOPE
Internet: kswope@wsgr.com
Direct Dial: (206) 883-2567

July 20, 2006

Via Facsimile & U.S. Mail

Francis C. Pizzulli, Esq.
718 Wilshire Boulevard
Santa Monica, CA 90401-1708

Re: Tur v. YouTube, Inc.

Dear Mr. Pizzulli:

We represent YouTube, Inc. ("YouTube") and have been asked to respond to your July 17, 2006 fax to me which enclosed a Complaint for copyright infringement against YouTube that was filed on July 14, 2006 in the Central District of California.

As you already know, YouTube is a free online service through which users can access and share original video content. As you should also know, YouTube respects third parties' intellectual property rights and has taken a variety of steps to help rights holders safeguard their content. Of particular importance here, YouTube has registered an agent for the receipt of notices of alleged copyright infringement occurring on its site pursuant to the Digital Millennium Copyright Act ("DMCA" -- 18 USC § 512), and promptly removes infringing material to which it is alerted. To its knowledge, YouTube has never received any notice from you or your client, pursuant to the DMCA, identifying material on the YouTube site that you believe infringes your client's copyrighted works. Nevertheless, YouTube will construe the Complaint you have faxed over as an attempt to provide such notice.

In Paragraph 13 of the Complaint, you allege certain copyrighted works were posted to the YouTube website. The titles listed in your Complaint appear to be the titles of these copyrighted works rather than the titles of video clips present on the site. Nevertheless, we have endeavored to remove all video clips based on the titles mentioned in the Complaint to the extent they appear to include helicopter news footage. Our search for "earthquake," however, yielded almost 700 results, and we were not able to identify which of the 700 were allegedly unauthorized by your client. To ensure that we have removed all of the allegedly infringing video clips, as well as to ensure that YouTube is not removing content whose owners want it to be accessible, the company would appreciate receiving a more specific notification from you. A proper notification under Section 512(c) of the DMCA, for example, would include information

"reasonably sufficient to permit the service provider to locate the [infringing] material." 17 U.S.C. § 512(c)(3)(A)(iii). YouTube thus requests that you provide it with an identification of the URLs within YouTube's website at which content allegedly infringing your client's copyrights may be found. Upon receipt of such information, we will expeditiously remove the material from the YouTube website. If you would like to email the URLs to me, my client will promptly remove those video clips.

Separately, we urge you to reconsider pursuit of your lawsuit. YouTube actively discourages infringing material on its site. YouTube has a policy prohibiting the posting of infringing material, which is found in its Terms of Service. YouTube prominently reiterates its policy against copyright infringement in bold text on pages where users upload their videos to the site. YouTube has adopted and implemented a repeat infringer policy, which is listed in its Terms of Use, and is uniformly enforced. And it has a "Copyright Tips" section of the website that serves to educate users about copyright infringement while discouraging it.

YouTube also employs technical measures to help copyright holders safeguard their rights on its site. For example, when YouTube removes a video at the request of a copyright holder, it takes a "hash" (i.e. a unique identifier) of the digital file. If someone tries to upload the same video file, regardless of whether the person is using a different username or name of file, the video file is automatically rejected by YouTube's system. Thus, if you provide us specific URL links for video files to be removed, those specific video files can never be uploaded to the YouTube system again. YouTube also has a tool that will automatically reject videos with run times greater than 10 minutes. The tool was designed in an effort to disallow infringing commercial programming from being uploaded to the site.

YouTube also has a Content Verification Program that you can evaluate at http://youtube.com/t/copyright_program. The program allows copyright owners to easily select videos on the site in order to claim ownership over them. Upon a submission to YouTube that identifies allegedly infringing videos, YouTube will remove them. We encourage content owners, like your client, to use this tool to easily detect and remove infringing material on the site.

Finally, as noted, YouTube is a service provider protected by the DMCA. It promptly responds to notifications of alleged copyright infringement occurring on its site, and it has regularly enforced a policy of terminating repeat infringers. YouTube is thus immune from liability for the alleged infringement you have identified.

If you would like to prosecute copyright infringement on YouTube's site, you may file a lawsuit against the copyright infringer. You may subpoena YouTube for information on the user

who posted the infringing material. It is YouTube's policy to provide copyright owners with user information pursuant to a validly issued subpoena under 17 U.S.C. § 512(h).

We hope that in light of all this information, your client will withdraw its Complaint. If not, YouTube will defend it vigorously. As an aside, we note that YouTube has not yet been served with a summons. We will consider your request that YouTube waive service of process after we hear your response to this letter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

Karin B. Swope

KBS:njp

cc: YouTube, Inc.

Levine Exhibit H

EVH

FRANCIS C. PIZZULLI, INC.
Law Corporation

Via Fax & Email

July 27, 2006

Ms. Karin B. Swope, Esq.
Wilson Sonsini Goodrich & Rosati
701 Fifth Avenue, Suite 5100
Seattle, WA 98104-7036
Fax: 206-883-2699

RE: *Tur v. YouTube, Inc.: Confidential Settlement Discussion, Fed. R. Evid. 408*

Dear Ms. Swope:

Thank you for your letter dated July 20, 2006. This letter is sent in light of Rule 408 of the Federal Rules of Evidence in light of your request for withdrawal of the complaint.

YouTube's Website Neither Qualifies for Section 512(c) Coverage Nor Is of the Class of Service Providers Intended to be Protected by OCILLA

It appears from your letter that YouTube's idiosyncratic usage of certain operative terms lies at the base of the dispute. In this regard, your final point, that YouTube "is a service provider protected by the DMCA," is the starting point of the discordance. It would simply stand the legislative history of the Online Copyright Infringement Liability Limitation Act ("OCILLA") on its head to conclude that it was intended to cover "bootleg-heavy' websites such as YouTube's. One cannot equate YouTube's business models and functions with "the local telephone companies, long distance carriers, America Online, etc." and other OSPs and ISPs who are intended to be the beneficiary of OCILLA. *See* S. Rep. No. 105-190.

Moreover, your letter fails to state under which provision of section 512(k) YouTube qualifies as a "service provider." Clearly, YouTube is not a section 512(k)(1)(A) "conduit" provider. *See*, e.g., *In re Charter Communications, Inc.*, 393 F.3d 771, 775 (8th Cir. 2005). YouTube apparently does not claim to be a provider of "network access, or the operator of facilities therefor."

We thus assume that YouTube's ostensible theory of service provider eligibility, within the meaning of section 512(k), is that it is a "provider of online services". As such category is not explicitly defined in either the DMCA or OCILLA, the legislative history is clearly relevant in interpreting not only section 512(k)(1)(B) eligibility, but also as to YouTube's alleged qualification for section 512(c)'s "storage-at-the-direction-of-users safe harbor." *See In re Charter Communications, supra*, 393 F.3d at 776.

Withholding safe harbor immunity from YouTube's flagrant post-*Grokster* contributory infringement liability hardly poses the risk of discouraging investment in the continuing build out and development of the infrastructure for the information superhighway that was Congress'

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FROM:FILES P.1 NO.903 PIZZULLI JUL.27.2006 8:05PM

concern in balancing the interests of copyright content providers in the digital environment. *See, e.g.*, May 14, 1998 Testimony of Sen. Hatch.

The "bootleg-heavy" YouTube Website does not fall within the paradigmatic bulletin board service as to whom the imposition of strict liability as a direct copyright infringer in *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), was the motivation for various interest groups to support OCILLA. *See, e.g.*, Sept. 16, 1997, Hearings before House Subcommittee on Courts and Intellectual Property. *Cf. Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263-64 (9th Cir. 1996).

YouTube Is a Burgeoning Content Provider

YouTube's Terms of Use party admission and its practices place it in the mold of a content provider-website. As YouTube's Terms of Use, Section 5.B states:

> . . . .you hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the User Submissions in connection with the YouTube Website and YouTube's (and its successor's) business, including without limitation for promoting and redistributing part or all of the YouTube Website (and derivative works thereof) in any media formats and through any media channels. You also hereby grant each user of the YouTube Website a non-exclusive license to access your User Submissions through the Website, and to use, reproduce, distribute, prepare derivative works of, display and perform such User Submissions as permitted through the functionality of the Website and under these Terms of Service. ..

In a similar vein, YouTube's marketing manager recently announced that YouTube intends to syndicate all or part of its Website through third party websites, in a mobile context and in similar types of syndication.

YouTube Is Ineligible for Safe Harbor Immunity Due to Financial Benefits Under Section 512(c)(D)(B)

Moreover, as you are undoubtedly aware, courtesy of the democratic blogging community, YouTube runs afoul of the section 512(c)(1)(B) safe harbor eligibility requirement that YouTube: "... (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity;...." Obviously, there can be no question of YouTube's right and ability to control. *See* Terms of Use Sections 3&5. The placement of advertisements on various website pages, including those containing infringing video clips, supports the fact that the high volume traffic of the "bootleg-heavy" website leads to overall advertising revenue gains.

Indeed, the centrality of YouTube's advertising business model – the model that was struck down in *Grokster* -- is evidenced by the leading job responsibilities listed in YouTube's listing for a Corporate Counsel position:

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JUL. 27. 2006 8:06PM PIZZULLI NO. 903 P. 2

- Create and maintain template agreements and legal procedures for YouTube's new ad-sales group; review, advise on, and negotiate creative sales and ad infrastructure agreements/proposals of various types;
- Negotiate and draft various other types of agreements, including:
  - Marketing, promotion, e-commerce and contest agreements with websites, device manufacturers and content companies;
  - Internet video license agreements with TV networks, movie studios and independent record companies"...

See also, e.g., Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 858 (C.D. Cal. 2006) (broad definition of "direct financial benefit" would encompass even a "future hope to 'monetize,' citing 4 Nimmer on Copyright § 12.04[A][1] (2005) (commenting on *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001)). (*See also* press reports regarding YouTube's highly publicized courtship of fairly significant investment/buyout opportunities).

YouTube Is Ineligible Under Section 512(c)(1)(A) Because of Its Long-Standing Awareness of Flagrant Piracy

As indicated above, YouTube is freely referred to in the mainstream media as a "bootleg-heavy" website, which rode the back of unlicensed copyrighted materials to great popularity. Further the evidence appears to be that YouTube routinely ignored all the "red flags" of copyright infringing activity. *See* Rep. No. 105-190. We suspect that in the voluminous electronic and other documentary evidence -- no doubt being preserved for this litigation -- there will be few if any instances on the part of YouTube's founders and management where they took down patently infringing clips from syndicated television shows prior to complaints from the copyright owners.1 Therefore, Mr. Tur simply is at a loss to comprehend how YouTube could satisfy section 512(c)(1)(A). The limitation to 10 minute sized clips is not just a day late and a dollar short, but also an admission of awareness of pervasive piracy.

Indeed, YouTube rode the wave of flagrant infringing activity directly to the financial benefit of arrangements such as are depicted on its website with NBC. *See* section 512(c)(1)(B). Thus, YouTube is neither "free" nor accessed solely to share "original" video content.

Simply put, YouTube cannot transmute itself into a storage-at-the-direction-of-users service provider, within the meaning of section 512(c), for "it is the province of Congress, not the courts, to decide whether to rewrite the DMCA 'in order to make it fit a new and unforeseen internet architecture' and 'accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.'" *In re Charter Communications, supra,* 393 F.3d at 777 (quoting *RIAA v. Verizon Internet Services, Inc.*, 351 F.3d 1229, 1238 (D.C. Cir.

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1 As Weblogs Inc. CEO Jason Calacanis wrote about the company's business model last February: "YouTube and other video hosting sites have made it easy to pirate stuff on the web (which is where piracy started), but they shouldn't be positioned as some revolutionary business..."

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Telephone (310) 451-3020 Fax (310) 458-6156
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2003).

Lastly, your letter does not make any reference to any technology that would prevent repetition in the form of uploads of different illegally obtained versions of Mr. Tur's registered works. Thus, there is no mechanism to prevent future infringement exposure that does not significantly alter YouTube's current conceptual model and tagging system.

Thus, Mr. Tur respectfully declines to withdraw his meritorious complaint given YouTube's failure to qualify for a section 512(c) safe harbor.

Accommodation

There is, however, an alternative that is capable of accommodating both sides' positions. Not surprisingly, this alternative is a non-exclusive license from Mr. Tur for both past and future infringements, which would retroactively become licensed uses. While Los Angeles News Service is more than a tad bit smaller than NBC, the same conceptual principles can apply.

If there is an interest in pursuing such a discussion forthwith, please advise. Until we hear your response on this point, we can table the issue of service of the summons.

Very truly yours,

FRANCIS C. PIZZULLI, INC.

Francis C J Pizzulli

Francis C.J. Pizzulli

cc: Mr. Robert Tur (via email)

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